

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Raymond Smith,

Petitioner,

vs.

Criag Apker,

Respondent.

No. CV 11-328-TUC-FRZ (BPV)

**REPORT AND
RECOMMENDATION**

Pending before the Court is a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Petition), filed on June 1, 2011. (Doc. 1) Petitioner, Raymond Smith, claims his constitutional rights were violated when he was convicted of a disciplinary violation without due process.

Before the Court is the Petition with exhibits (doc. 1), Respondent's return with accompanying exhibits (doc. 10) (Answer), and Petitioner's reply (doc. 13).

Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Bernardo P. Velasco for a Report and Recommendation. (Doc. 4)

For the reasons discussed below, the Magistrate Judge recommends that the District Court enter an order denying the Petition.

I. PROCEDURAL BACKGROUND

Petitioner is presently incarcerated in the United States Penitentiary (USP) - Tucson. (Petition, p.1; Answer, Ex. 1). This was also his place of incarceration at the time he filed his Petition. (Petition, p.1) At the time of the incidents which resulted in the disciplinary proceedings at issue in this Petition, however, Petitioner was housed at

1 Federal Correctional Institution (FCI) II Victorville, California. Petitioner contends that
2 his constitutional rights were violated when he was convicted of a disciplinary violation
3 without due process. Petitioner's disciplinary conviction resulted in the loss of good time
4 credits. Smith is currently serving a 400-month sentence of incarceration for conspiracy
5 to distribute narcotics, and attempt to possess with intent to distribute narcotics, and is
6 projected to complete this sentence on November 19, 2030, via Good Conduct Time
7 Release. (Answer, Ex. 1, Attachment 2)

8 **II. DISCIPLINARY HEARING AND PROCEEDINGS**

9 On July 24, 2010, Smith was observed with receiving items from his girlfriend in
10 the visiting room during the visit, taking the items in his mouth and swallowing the items.
11 (Answer, Disciplinary Hearing Officer Report, ¶ III.C.4, Officer S. Guevera's statment)
12 Petitioner was searched and placed on Dry Cell Status in the Special Housing Unit
13 (SHU), and, on July 27, 2010, provided a stool sample which, upon inspection, contained
14 six balloons. (Answer, Incident Report, ¶ 11.) The balloons contained a substance which
15 SIS staff tested on July 28, 2010 for narcotics. (*Id.*) The substance tested positive for
16 THC, an active ingredient in marijuana, and SIS Technician C. Herrera reported the
17 incident as a violation of Code 111, Introduction of Narcotics. (*Id.*, ¶¶ 11-13, Ex. 2, ¶ 6)

18 On July 28, 2010, Lieutenant M. Lopez, delivered a copy of the Incident Report to
19 Smith, advised him of his right to remain silent, and conducted an investigation of the
20 incident. (*Id.*, ¶¶ 14-16, 22-23) When asked if he wished to comment, Petitioner stated
21 "no comment" and offered no additional information during this stage of the
22 investigation. (*Id.*, ¶¶ 24-25) Based on the information summarized above, Lieutenant
23 Lopez concluded that Smith had been properly charged, recommended that Smith remain
24 in the SHU, and that the incident be referred to the Disciplinary Hearing Officer for
25 further processing. (*Id.*, ¶ 27)

26 Smith commented to the Unit Disciplinary Committee (UDC) regarding the
27 incident report, that he should not be charged with introduction in violation of Code 111,
28 rather he should be charged only with possession because he found the drugs on the yard.
(*Id.*, ¶ 17) The UDC referred the inmate to the Disciplinary Hearing Officer (DHO) for

1 further action, and recommended that Smith lose phone and visiting privileges for one
2 year. (*Id.*, ¶ 20)

3 On August 18, 2010 R.A. Byrd, the DHO, conducted a disciplinary hearing.
4 (Answer, Attachment 2, Discipline Hearing Officer Report) Petitioner requested a staff
5 representative and Case Manager Hammoude appeared and provided a statement from
6 Medical. (*Id.*, ¶ II.B-D.) Requested witnesses, Lieutenant M. Finerfrock and Officer S.
7 Guevara did not appear, but submitted statements. (*Id.*, ¶ III.C.4)

8 The DHO found Petitioner committed the prohibited act of possession of narcotics
9 paraphernalia, in violation of Code 113. (*Id.*, ¶ V) The DHO based her findings on the
10 reporting officer's statements, the photographs of the colored balloons, and the
11 statements of inmate Smith. (*Id.*) The DHO sanctioned Petitioner to a loss of 40 days
12 good conduct time, 60 days of disciplinary segregation, 1 year loss of visits, 6 months
13 immediate family only visits, and recommended a disciplinary transfer. (*Id.*, ¶ VI)

14 **III. DISCUSSION**

15 **A. Jurisdiction**

16 A federal court may not entertain an action over which it has no jurisdiction.
17 *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000). Writ of habeas corpus relief
18 extends to a person in custody under the authority of the United States if the petitioner
19 can show that he is "in custody in violation of the Constitution or laws or treaties of the
20 United States." 28 U.S.C. §§ 2241(c)(1) & (3). A prisoner who wishes to challenge the
21 manner, location, or conditions of a sentence's execution must bring a petition pursuant to
22 § 2241 in the custodial court. *Hernandez*, 204 F.3d at 864, and must file the petition in
23 the judicial district of the petitioner's custodian. *Brown v. United States*, 610 F.2d 672,
677 (9th Cir. 1980).

24 In the instant case Petitioner is seeking relief with respect to disciplinary
25 proceedings that, in part, resulted in the loss of good time credit while incarcerated at
26 USP-Tucson. Petitioner is challenging the legality of the manner in which his sentence is
27 being executed. Thus, the Petition is properly before this Court under 28 U.S.C. §2241.
28

1 B. Exhaustion

2 Before filing a petition for writ of habeas corpus, a federal prisoner challenging
3 any circumstance of imprisonment must first exhaust all administrative remedies.
4 *Martinez v. Roberts*, 804 F.2d 570, 571 (9th Cir. 1986). The Government concedes that
5 Petitioner exhausted his administrative remedies regarding the disciplinary action. (*See*
6 Answer, Doc. 10, at 8, ¶ 14; Ex.1, ¶ 4; *see also* Petition, at 2, and Exhibits)

7 C. Merits

8 1. *Due Process*

9 Federal prisoners have a statutory right to good time credits. *See* 18 U.S.C. § 3624.
10 Accordingly, they have a due process interest in the disciplinary proceedings that may
11 take away those credits. *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974). "Due process
12 in a prison disciplinary hearing is satisfied if the inmate receives written notice of the
13 charges, and a statement of the evidence relied on by the prison officials and the reasons
14 for disciplinary action." *Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1987)(citing
15 *Wolff*, 418 U.S. at 563-66.). "The inmate has a limited right to call witnesses and to
16 present documentary evidence when permitting him to do so would not unduly threaten
17 institutional safety and goals." *Id.* (citing *Wolff*, 418 U.S. at 566.) Once these *Wolff*
18 procedural protections are followed, the only function of a federal court is to review the
19 statement of evidence upon which the committee relied in making its findings to
20 determine if the decision is supported by "some evidence." *Superintendent. Mass. Corr.*
21 *Inst. v. Hill*, 472 U.S. 445, 455 (1984) ("The requirements of due process are satisfied if
22 some evidence supports the decision by the prison disciplinary board.")

23 Petitioner asserts that the he was not given a 24-hour notice prior to the hearing
24 before the DHO, contrary to Program Statement (P.S.) 5270.08 and CFR 541.17.¹

25
26 ¹ Presumably Petitioner is referring to 28 C.F.R. § 541.17 (2010). The regulations
27 promulgated in this section have, since the time of Petitioner's offense been revised and
28 renumbered. *See* 75 FR 76263-01. The regulation directing the timing of DHO hearings
is now found at 28 C.F.R. 541.8, Inmate Discipline and Special Housing Units,
Discipline Hearing Officer hearing. This Report and Recommendation will refer to the
2010 version of the regulations in existence at the time of Petitioner's disciplinary

1 Petitioner further asserts that the UDC staff violated the rights of Petitioner in not
2 securing a confidential hearing for Petitioner, and conducted the hearing in an area in
3 front of the inmate's cell while housed within the SHU, contrary to policy regulation
4 5293.052.

5 *I. Notice*

6 In the federal prison system, the Bureau of Prisons has, by regulation, adopted
7 specific guidelines for inmate discipline procedures which are set forth at 28 C.F.R. §
8 541.10 *et seq.* These guidelines largely track the due process requirements established by
9 the Supreme Court in *Wolff*. *See Young v. Kann*, 926 F.2d 1396, 1404 (3rd Cir. 1991).
10 Under these regulations, when prison staff have reason to believe that a prohibited act has
11 been committed by an inmate, an incident report must be prepared and referred for
12 investigation. 28 C.F.R. § 541.14. After investigation, the incident report is referred to a
13 Unit Discipline Committee (UDC) for an initial hearing. 28 C.F.R. § 541.15. The inmate,
14 in turn, is entitled to notice of any proposed violation. The UDC may either reach a
15 finding regarding whether a prohibited act was committed, or refer the case to the
16 Discipline Hearing Officer (DHO) for further hearing. 28 C.F.R. § 541.15(f). The DHO
17 then has the authority to dismiss any charge, to find a prohibited act was committed, and
18 to impose any available sanction for the act. 28 C.F.R. § 541.18. The DHO hearing is
19 conducted pursuant to the procedures set forth at 28 C.F.R. § 541.17.

20 Throughout this hearing process the inmate is provided with a series of procedural
21 rights. For example, the inmate is entitled to notice of the alleged infraction. Specifically,
22 the Warden must give the inmate advance written notice of the charges no less than 24
23 hours before the DHO hearing. 28 C.F.R. § 541.17(a). The inmate is also entitled to
24 assistance at DHO hearings. In particular, the Warden must provide the inmate with a full
25 time staff member to represent him at the DHO hearing. 28 C.F.R. § 541.17(b).

26 As to Petitioner's claim that the disciplinary procedures violated his due process
27 rights because he was not given notice, specifically by the Warden of the facility, 24
28 proceeding.

1 hours prior to the hearing, Petitioner's argument fails as a matter of fact, and as a matter
2 of law. Pursuant to both Bureau of Prison policy and federal regulations, an inmate is to
3 be given written notice of a charge no less than 24 hours before the DHO's hearing. *See*
4 P.S. 5270.08 and 28 C.F.R. § 541.17. The Incident Report was written by SIS Technician
5 C. Herrera on July 28, 2010, at approximately 9:30 am. The written notice was provided
6 to Petitioner on July 28, 2010, at approximately 12:40 pm by Lieutenant Lopez. This
7 notice was provided to the inmate well over 24 hours before his appearance before the
8 DHO. Though Petitioner states that the Warden is specifically designated with the duty of
9 ensuring that the inmate receives this notice, and that in this case, this was not
10 accomplished, there is no provision in the program statement or the regulations that this
11 duty may not be delegated. *See* 28 C.F.R. 541.17 (2010). In fact, the Program Statement
12 specifically contemplates that notice will be provided by "staff." *See* P.S. 5270.08.

13 Additionally, even if it were a violation of prison regulations for the Warden to
14 fail to individually notify Smith of the charge, a violation of a Bureau of Prisons'
15 regulation does not rise to a due process violation. Indeed, due process does not impose a
16 requirement that notice be provided by the Warden. As noted above, the Supreme Court
17 held that the Constitution requires compliance with minimal federal due process
18 standards and explained that these minimal requirements are: (1) written notice of the
19 charges against him at least 24 hours before his hearing; (2) a written statement by the
20 fact finders as to the evidence relied upon and the reasons for the disciplinary action
21 taken; and (3) an opportunity to call witnesses and present documentary evidence in his
22 defense. *Wolff*, 418 U.S. at 563-67. As these requirements were met in this case,
23 Petitioner's dissatisfaction with process of his notification does not implicate due process
24 concerns, and Petitioner has not in fact articulated any way in which he was harmed by
25 this delegation of the notification procedures. Moreover, the relevant inquiry is not
26 "whether the prison complied with its own regulations," but whether Plaintiff was
27 "provided with process sufficient to meet the *Wolff* standard." *Walker v. Sumner*, 14 F.3d
28 1415, 1420 (9th Cir.1994), *abrogated on other grounds by Sandin v. Conner*, 515 U.S.

1 472 (1995).

2 2. *Confidential UDC hearing*

3 As to Petitioner's claim that his UDC hearing was not conducted in a secure
4 hearing location, this claim also fails to raise a due process violation. Petitioner alleges
5 this violates policy regulation 5293.052. The Court was unable to find a Bureau of Prison
6 Policy Statement 5293.052, but presumes that Petitioner is referring to the form "Inmate
7 Rights at Discipline Hearing" which is form BP-A0293, a form that replaced BP-
8 S293(52). That form explains the rights an inmate has at a Discipline Hearing in front of
9 a DHO. Petitioner has not alleged that he was not given a copy of the charges, was denied
10 the right to a staff representative, the right to call witnesses, to present a statement, to be
11 present throughout the hearing, to be advised of the DHO's decision, or to appeal the
12 decision of the DHO. Though Petitioner states he was unable to communicate with the
13 UDC in confidence, he has not alleged that he requested to speak with the UDC in a
14 confidential setting, or that he was later unable to present any confidential information in
15 his defense to the DHO in a confidential setting. Petitioner does not allege any facts at
16 this time that he would have presented had he had the opportunity to do so.

17 3. *Staff Representative and Witnesses*

18 Petitioner raises for the first time in his reply a claim that either the failure of the
19 DHO to allow the requested staff witnesses to testify, instead of submitting written
20 statements, or the failure of his requested staff representative to represent him instead of
21 Case Manager Hammoude, would have cast doubt about his actual guilt in this instance,
22 or would have assisted him in bringing the due process issue to the forefront in a way that
23 he could not. It is well established, however, that the Court will not address an argument
24 raised for the first time on reply. *See United States v. Berry*, 624 F.3d 1031, 1039 n. 7 (9th
25 Cir. 2010) (declining to address an argument raised for the first time in a reply brief in a §
26 2255 motion); *Belgrade v. Montana*, 123 F.3d 1210, 1216 (9th Cir. 1997) (declining to
27 consider claims not raised in the original habeas petition to the district court).

28 Furthermore, the Court has reviewed the incident report and the DHO report and

1 finds that the due process requirements of a prison disciplinary hearing, as established by
2 *Wolff, supra*, were met in this case. The Petitioner received notice well in advance of the
3 hearing. The hearing was conducted by DHO R. A. Byrd, whom the Petitioner does not
4 dispute was an impartial officer. Petitioner was allowed to present witnesses and
5 documentary evidence. He was also afforded an opportunity to have a staff
6 representative. Petitioner was given a copy of the DHO's report which contained a
7 written statement of the evidence relied upon and the reasons for the sanctions on August
8 20, 2010. During the hearing, Petitioner argued that he should have been charged with
9 Code 113 instead of Code 111, but presented no evidence that he was in fact innocent of
10 the charges. The DHO agreed with the inmate and found him to have committed the
11 prohibited act of Code 113.

12 Accordingly, the Court finds that Petitioner's claim that he was deprived of due
13 process is without merit and fails to provide a basis for relief.

14 **IV. RECOMMENDATION**

15 The Magistrate Judge recommends that the District Court, after its independent
16 review, enter an order DENYING the Petition.

17 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections
18 within fourteen days after being served with a copy of this Report and Recommendation.
19 A party may respond to another party's objections within fourteen days after being served
20 with a copy thereof. Fed.R.Civ.P. 72(b).

21 If objections are not timely filed, then the parties' right to *de novo* review by the
22 District Court may be deemed waived.

23 If objections are filed the parties should use the following case number: **No. CV-
24 11-328-TUC-FRZ.**

25 **Dated this 15th day of March, 2012.**

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27 _____
28 Bernardo P. Velasco
United States Magistrate Judge